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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFFORD USHER,

Defendant and Appellant.

B175112

(Los Angeles County
Super. Ct. No. PA 045308)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Meredith C. Taylor, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Assistant Attorney General, Deborah J. Chuang and
Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant was charged, and found guilty by a jury, of one count of forgery. The court found that appellant had been convicted of the prior felony of car-jacking, for which he had been sentenced to a seven-year prison term. The court found this to be a prior strike offense. The court denied appellant's motions to strike the prior (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), and to reduce the forgery conviction to a misdemeanor. The court sentenced appellant to a prison term of two years and, based on the prior conviction, doubled that sentence. The court awarded presentence custody credit and imposed a restitution fine of \$200.

Appellant presented a check to a Wells Fargo branch bank in Northridge drawn on the account of Paper Trail, Inc., in the amount of \$721.49, payable to appellant. The teller became suspicious and contacted Paper Trail. The teller's suspicions were well founded, and appellant was arrested in the bank by the police. The check was a forgery.

Appellant's defense was that he got the check from a Mr. Thomas, for whom he had done some work, and that he did not inspect the check before presenting it to the teller.

Appellant's sole contention is that he was denied his right to represent himself.

Appellant represented himself during the preliminary hearing. At his arraignment on October 10, 2003, appellant requested to be allowed to represent himself. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).) Judge Ronald Coen admonished appellant about the pitfalls of self-representation in a criminal case, and made the appropriate inquiries into appellant's understanding of those pitfalls. The trial court found that appellant was mentally competent, and that he understood the consequences of representing himself. The court granted appellant's request.

On November 20, 2003, while still in propria persona, appellant's motion to strike the prior was denied by Judge Meredith Taylor. The People offered the low term with an admission of the prior for a total of 32 months, but appellant refused the offer. During the same hearing, appellant informed the court that he wanted to

withdraw his request to represent himself, and that he wanted a lawyer. The court appointed Deputy Public Defender Lira to represent appellant.

On December 9, 2003, appellant told Judge Taylor that: “I would prefer to represent myself because I see that as a conflict of interest based on she [Lira] was my attorney prior to going pro per the first time.” The court replied: “You asked to be relieved of your pro per status. You have been relieved of that. I’m not going to reinstate it, Mr. Usher.” The court gave appellant some time to think about whether he wanted to make a *Marsden* motion. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)). Appellant decided that he wanted to make such a motion.

During the *Marsden* hearing, appellant stated that attorney Lira was not competent because she did not return his telephone calls and because she interviewed him in the presence of a third party. Appellant also stated that Lira had been his counsel before, and that he did not want her then, or now, after he had given up his in propria persona status. During the ensuing hearing, it developed that there was a disagreement between appellant and Lira about what witnesses to call.

The court denied the motion. The court stated that Lira was proceeding in a competent manner, and that appellant’s complaints were unfounded. The court concluded: “So I’m finding that you are not ineffectively represented; but [*sic*] there is no conflict. You simply don’t like her [Lira]; and you are a person, Mr. Usher, who is very bright, very capable and very controlling. Those things go hand in hand. [¶] You’re trying to control me and you’re trying to control your attorney by saying, ‘Your Honor, you won’t give me this different attorney. I’m just going to go pro per.’ [¶] So you’re playing games and you’re trying to effect control of court and counsel. [¶] It doesn’t work that way; and so I have previously denied your request to reinstate pro per status and I am denying your request to be represented by new and different counsel.”

The case was called for a status conference on December 22, 2003, before Judge Taylor. Ms. Lira stated that appellant declined to speak with her, and that he

didn't want her as his attorney. Judge Taylor stated that appellant was not going to be allowed to "control the court or his attorney." Ms. Lira stated: "The only problem I have, judge, is I am concerned that he has his *Faretta* rights and he wants to exercise them. I know the court has declined them. [¶] He seems quite capable of doing that; and he's reasserted he would like to represent himself with me [*sic*]. I think he's entitled to do that."

The court replied: "He was pro per and gave it up to have counsel. Now he doesn't like what's happening in the court. So he wants to go pro per again. [¶] It appears to the court -- and we've discussed it before -- that Mr. Usher is playing games with the court, that he is attempting to control the function of the court and how his attorney operates; and I'm not willing to join in that game. [¶] So, no, I will reappoint him pro per; and that is the status that it is."

On January 8, 2004, prior to the commencement of trial, the court addressed some issues arising from the presence of appellant's family in the courtroom. The trial court went on to state: "Then, Ms. Lira, as you know only too well, Mr. Usher was pro per for a period of time. [¶] He asked the court to be represented by counsel; and then things got kind of tough and nasty for a little bit, and he wasn't so happy being represented by counsel. [¶] It looks to me now as though the two of you appear to be getting along quite well; and I'm wondering is he content to go forward represented by counsel? [¶] DEFENDANT USHER: Yes, Ma'am. [¶] THE COURT: Is that agreeable to you, Ms. Lira? [¶] MS. LIRA: Certainly."

It appears that on January 8, 2004, appellant was "content to go forward represented by counsel." Thus, his contention on appeal that he was denied his right to represent himself is untenable.

Appellant refers to the court's question on January 8, 2004, addressed to appellant, in his opening brief, but does not cite appellant's answer to the question. Appellant states in his brief, referring only to the court's question: "This attempt at

reconciliation, after appellant's attempts to represent himself had been thwarted, cannot be construed as a waiver of his *Faretta* rights."

We do not approve of such a selective, and inaccurate, rendition of the record. Appellant is free to propound the theory, however irrelevant or unfounded, that the exchange was an "attempt at reconciliation," but he is not free to delete from his account of the exchange the critical fact that appellant expressed satisfaction with Ms. Lira and, importantly, that he did *not* request to represent himself, when he had a clear opportunity to do so. In the same vein, we note that appellant omitted from his account of events in his appellate brief that in October 2003 he requested, and was given, the right to represent himself, and that he was returned to in propria persona status at his own request in November 2003.

This additional omission is significant because the omitted circumstance, the granting of appellant's request to represent himself in October 2003, validates the course of action the court took in December 2003, when Judge Taylor refused to return appellant to his in propria persona status. The supreme court has recognized the danger that defendants might use the right of self-representation to manipulate the court to create reversible error. (*People v. Marshall* (1997) 15 Cal.4th 1, 22-23.) Appellant's request in December 2003 to represent himself appears in a different light if one takes into account the granting of his request in October 2003, and his voluntary abandonment of his in propria persona status in November 2003. While it is conceivable that there are cases where a defendant may validly change his mind three times about being in propria persona, in this case the trial court correctly weighed the summary nature of appellant's request in December 2003 against the fact that appellant had been granted the right to represent himself, but then voluntarily abandoned it. The trial court's denial of appellant's request in December 2003 was appropriate, since it appeared that the request was made in order to manipulate the record and create error where there was no error, and where there was no deprivation of a constitutionally protected right.

Appellant's statement on January 8, 2003, that he was satisfied with his counsel and wished to go to trial represented by counsel operates as a waiver of the issue raised on appeal.

The judgment is affirmed.

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FLIER, J.

We concur:

RUBIN, Acting P.J.

BOLAND, J.